PONNUDURAI v. JAYATILEKA

[A.C.J. (Ong J.) November 4, 1964]

[K.L. — Civil Appeal No. 9 of 1964]

Landlord and tenant — Recovery of possession — Finding of reasonableness based on assumption — No evidence of availability of suitable alternative accommodation — Order for double rent — Control of Rent Ordinance, 1956, ss. 12(1)(f) & (n) and 22.

The appellant as landlord of the respondent in respect of rent controlled premises, commenced an action for recovery of possession of the said premises on the grounds set out in paragraph (f) and (n) of section 12 of the Control of Rent Ordinance, 1956. On the facts, the magistrate found that (1) the landlord reasonably required the premises for his own use but that greater hardship would be caused to the tenant by making an order with immediate effect, and (2) it would be an injustice to the landlord to deprive him of the premises *sine die* and that if adequate time was given to the tenant, the balance of hardship would swing in favour of the landlord. Accordingly, the magistrate made an order for possession after November 30, 1965 and for payment of double rent from June 1, 1964. Both parties appealed.

Held: (1) the magistrate in granting relief under paragraph (n) of section 12 of the Control of Rent Ordinance 1956 erred in law because (a) his findings of reasonableness were based on false premises and (b) there was no evidence that suitable alternative accommodation would be available to the tenant by November 30, 1965;

(2) the learned magistrate erred in making an order for double rent in view of *Ong Keng Huat* v. *Shaw & Shaw Ltd.*(2) and section 22 of the Ordinance.

Cases referred to:—

(1) *Yeong Peng Wah* v. *Bahal Singh* [1961] M.L.J 316, 317.

(2) *Ong Keng Huat* v. *Shaw & Shaw Ltd.* [1957] M.L.J. 46, C.A.

CIVIL APPEAL.

N. A. Marjoribanks for the appellant.

R. R. Chelliah for the respondent.

Cur. Adv. Vult.

Ong J.: In an action by the landlord of rent-controlled premises against his tenant for possession thereof, the learned magistrate, Kuala Lumpur, made an order on May 16, 1964, that the tenant deliver up vacant possession on November 30, 1965, and in the meantime pay double rent from June 1, 1964. Both parties have appealed against such order.

The material facts are not in dispute. The landlord is a clerk in the Accountant-General's office, earning a total of $1,078 per month. He is 55 and will retire on pension in 1969. He was occupying Government quarters from 1936 till he went on leave to Ceylon in 1957. For some reason or other, which did not appear on his service record, he did not then apply for retention of his quarters, though it appears from the evidence of the Government accommodation officer, Mr. Lee Mok Sang, that officers of Divisions I and II on vacation leave not exceeding 3 months, and those on study leave not exceeding one year, would normally be allowed to retain their quarters. On August 8, 1960, the plaintiff purchased the premises No. 17 Jalan Inai, Kuala Lumpur, for $20,000, then and still in the occupation of the defendant as tenant. He is married but childless, and a niece of 13 lives with him, in privately-owned premises, not rent-controlled, comprising 2 bedrooms, a sitting and dining room and a kitchen, for which he pays a monthly rent of $160. He obtains a rent allowance of $80 from Government.

The defendant has been tenant of No. 17 Jalan Inai for the past 30 years. He is a teacher in the Methodist Boys' School, Kuala Lumpur, earning a total of $1,185 monthly, and is 57 years old, due to retire three years hence at 60. Meanwhile he supports a son studying in the United Kingdom; another son lives outstation, and the members of his family presently living with him in the premises are his wife and their three other sons, all dependants. He has for the past three years been in delicate health from hypertension and the after-effects of coronary thrombosis and hepatitis. He is at liberty to retire now, if he so desires, and would in that event be getting a lump sum of about $60,000 from the Employees Provident Fund, but because he would draw no pension he has decided to continue in harness in order to discharge his family responsibilities. The family occupy 5 bedrooms (two were converted bathrooms) with other usual rooms and kitchen. The rent of the premises is $42.60 per month, for which he obtains the same rent allowance of $80 as the plaintiff.

The facts set out above are material because the issue which falls to be decided is whether or not a claim, which fails on the ground set out in paragraph (f) of section 12(1) of the Control of Rent Ordinance, 1956, may still succeed under paragraph (n) on the facts established.

It is clear, from paragraphs 4 and 5 of the statement of claim, that the plaintiff-landlord relied on both grounds. The relevant provisions of the Control of Rent Ordinance are as follows:

"12(1) No order or judgment for the recovery of possession of any premises comprised in a tenancy shall be made or given except in the following cases, namely —

(f) where the owner of the premises reasonably requires the same for occupation by himself or any member of his family or any person for whom he holds the premises in trust, and —

(i) there has been no change by purchase in the ownership of the premises since the fifteenth day of February, 1942; or

(ii) the tenancy has been determined by not less than one year's notice to quit and there has been no change by purchase in the ownership of the premises within one year next preceding the date of such notice:

Provided that an order or judgment shall not be made or given on any ground specified in this paragraph if the court is satisfied that, having regard to all the circumstances of the case, including the question whether other accommodation is available for the owner or the tenant, greater hardship would be caused by granting an order or judgment than by refusing to grant it:

(n) in any case, whether falling within any of the preceding paragraphs or not, where the court considers it reasonable that such an order or judgment be made or given and is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order or judgment takes effect."

Yeong Peng Wah v. *Bahal Singh* [1] is authority for the proposition that paragraph (n) of section 12(1) stands independently as one of fourteen different grounds when a landlord might recover possession of premises from his tenant. What falls to be considered now is the question of reasonableness postulated in paragraph (n) and whether the requirement of alternative accommodation has been satisfied in order to warrant an order being made in favour of the landlord.

On the facts above stated the learned magistrate came to the following conclusion:

"(1) That the court considers the plaintiff had established that he reasonably required the premises for his own use, but in spite of this finding, greater hardship would be caused to the defendant if the order is made with immediate effect than its refusal to the plaintiff.

(2) That it would be an injustice to the plaintiff to deprive him of the house *sine die* and that if adequate time is given to the defendant, balance of hardship would swing in favour of the plaintiff."

I think he must be understood to mean that, notwithstanding the landlord's inability to establish any right to immediate possession under paragraph (f), it would be reasonable for the latter to recover possession, provided that it is postponed to a later date. In effect, therefore, he was granting relief under paragraph (n). To do so, the learned magistrate had, of course, to be satisfied, not only that the order was reasonable in all the circumstances, but also that suitable alternative accommodation would be available by November 30, 1965, to the tenant.

I am impressed by the lucidity of the learned magistrate's judgment, to which much lucubration had been given. I have reminded myself that, on the issue of reasonableness, the discretion to be applied is that of the trial judge — not the appellate court — and that where evidence of reasonableness had been led, it will be assumed that he had properly applied his mind to all relevant considerations. Without any idea of being hypercritical, however, I am unable to overlook the fact that he reached his conclusion on two assumptions: (a) as to the landlord, that "he is approaching the age of retirement and if the new regulation extending the age of retirement at the age of 60 years is withdrawn he would retire sooner and then he would certainly require the premises for himself since he would not be in a position to pay a high rental with the money he would be receiving by way of pension. It is to that foreseeable future that the court directed its mind when it gave judgment for possession after 30th November 1965"; and (b) as to the tenant, that "he would be forced to retire at the end of the year (and) he would require a minimum period of one year to get the money from the Employees Provident Fund and build a house of his own. The defendant would then be able to move to the new premises with the minimum of hardship to himself and his family. There would then be lesser hardship to the defendant than the plaintiff, for there would be security of tenancy and no problem of accommodation which may cause deterioration to his health. It is with these ideas in mind that I gave the order for eviction after 30th November 1965."

I need hardly observe that the possibility of the landlord's retirement age being advanced is too remote to be foreseeable, nor is there on the part of the tenant, any evidence of his intention to retire if he can possibly help it. Consequently, and with reluctance, I am compelled to hold that the ground on which the issue of reasonableness rests is erroneous because such a conclusion was based on false premises.

To proceed a step further, I am inclined to think that the learned magistrate appeared to have also overlooked the fact that, where the landlord's only hope of recovering possession was under paragraph (n), the availability of suitable alternative accommodation is a *sine qua non*. As to this, there is not an iota of evidence that the present owner of the premises occupied by Mr. Ponnudurai is willing or bound to accept Mr. Jayatileka as tenant in place of Mr. Ponnudurai, now or at any time hereafter, with reasonable security of tenure and not on impossible terms. The judgment is silent as to the availability of alternative accommodation, nor had the suitability of No. 17 Jalan Inai ever been considered.

Since the decision of the learned magistrate cannot be affirmed for the reasons above stated, nothing turns on the further question, which is raised by both parties, that the learned magistrate was wrong in making an order which suspended execution for as long as 18 months. It is at any rate implicit in paragraph (n) that a suspended order for a reasonable period is contemplated. As to double rent, the learned magistrate had erred in good company: (see *Ong Keng Huat* v. *Shaw & Shaw Ltd.*,[2] and section 22 of Control of Rent Ordinance, 1956).

The appeal is dismissed and the cross-appeal allowed. The order of the learned magistrate is

accordingly set aside, no order as to costs.

Appeal dismissed;
Cross-appeal allowed.

Solicitors: *Lovelace & Hastings; R. R. Chelliah.*

VIRUTTHASALAM & ORS. v. PHANG QUEE

[O.C.J. (Abdul Aziz J.) November 5, 1964]

[K.L. — Civil Suit No. 673 of 1961]

Land laws — Mining sub-lease — Nature of — Payment of tribute — Surrender of sub-lease — Whether such payment can be recovered — "Advance payments of tribute" — Meaning of.

In this case the defendant sub-leased certain mining lands to the plaintiffs, who paid $7,762 as advance payments of tribute. The plaintiffs subsequently surrendered the sub-lease and claimed the return of the sum paid by him, less the amount already paid by the defendant to the plaintiffs as tribute.

Held: the payment by the plaintiffs should be regarded as a loan made by them to the defendant, the loan to be repaid by deductions from any tribute upon ore which the miner may extract from the land and although in this case the tribute is no longer payable, the defendant remained liable to repay the balance of the loan.

Cases referred to:—

(1) *Gowan* v. *Christie* (1873) L.R. 2 S.C.App. 273.

(2) *Stockloser* v. *Johnson* [1954] 1 Q.B. 476.

CIVIL SUIT.

Y. C. Chin for the plaintiffs.

M. W. Maxwell for the defendant.

Cur. Adv. Vult.

Abdul Aziz J.: By a sub-lease dated 3rd January, 1961, the defendant sub-leased certain mining lands in Kerling, Selangor, to the plaintiffs. Although the opening clause in the sub-lease speaks of $7,762 as being the consideration for the sub-lease, the operative clause 2C states:—

"The sum of $7,762 shall be treated as advance payments of tribute and the sub-lessees shall be at liberty to deduct 25 per centum of the tribute payable by them hereunder until such time as the said sum of $7,762 is fully repaid and thereafter the full tribute shall be paid by the sub-lessees to the sub-lessor."

The plaintiffs, having surrendered the sub-lease with the consent of the defendant, now claim for the return of $7,500 less $445.27 already paid by the defendant to the plaintiffs as tribute. It was contended by the plaintiffs that $7,762 was a deposit and that since neither the mutual agreement nor the sub-lease makes any reference to the forfeiture of the deposit upon recission of the contract, the amount paid is recoverable.

No evidence has been adduced on either side on the facts and the question here is whether upon a true construction of the clause 2C the $7,762 paid by the plaintiffs was recoverable in law or in equity.

The words "advance payments of tribute" can be construed either as meaning that $7,762 was the pre-payment of the price of the ore to be extracted from the land or as a loan made by the plaintiffs to the defendant to be repaid by deductions from the tribute payable on the land.

Lord Cairns in *Gowan* v. *Christie* [1] said of a mining lease:

"What we call a mining lease is really, when properly considered, a sale out and out of a portion of land. It is the liberty given to a particular individual for a specific length of time to go into and under the land and to get certain things there if he can find them, and to take them away just as if he had bought so much of the soil."

A tribute can therefore be fairly described as the purchase price of the soil that the miner removes from the land. Even if the $7,762 is regarded as the pre-payment of the purchase price of the ore, equity will always relieve against the forfeiture of the purchase price if in the circumstances of the case it would be unconscionable for the sub-lessor to retain the money, see *Stockloser* v. *Johnson.* [2] Since in the present case only a small amount of ore has been extracted from the land as manifested by the tribute already accrued, it would be unconscionable for the sub-lessor to retain the money.

Having regard to the nature of the transaction and since clause 2C itself makes reference to "repayment", the above construction is untenable. The intentions of the parties must therefore be gathered from the whole *fortius contra preferentes.* It would be more reasonable to say that the $7,762 was a loan made by the plaintiffs to the defendant, the loan to be repaid by deductions from any tribute upon ore which the miner may extract from the land. Since tribute is no longer payable, that method of re-payment is no longer available to the defendant but the liability to repay the balance of the loan still remains.

There will accordingly be judgment for the plaintiffs for $7,054.73 plus interest and costs.

Judgment for the plaintiffs.

Solicitors: *Skrine & Co.; P. T. Wong & Co.*

PUBLIC PROSECUTOR v. LI CHUAN PIN

[A.C.J. (Winslow J.) November 9, 1964]

[Singapore — Magistrate's Appeal No. 149 of 1964]

Fraudulent Debtors Ordinance (Cap. 116), s. 3 — Bankruptcy Ordinance (Cap. 11), s. 113 — Obtaining credit by false pretences — Meaning of "intent to defraud".

Bankruptcy — Obtaining credit by false pretences — Fraud — "Intent to defraud".